No. 20-2936

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

COUNTY OF BUTLER, *et al.*,

Plaintiffs-Appellees,

v.

GOVERNOR OF PENNSYLVANIA, *et al.*,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA (NO. 2:20-CV-677-WSS)

BRIEF OF AMICI CURIAE NEW JERSEY AND DELAWARE IN SUPPORT OF DEFENDANTS-APPELLANTS AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

As States, all amici are governmental entities with no reportable parent companies, subsidiaries, affiliates, or similar entities under Fed. R. App. P. 26.1(a).

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IDENTITY AND INTEREST OF AMICI CURIAE

Amici States, New Jersey and Delaware, submit this brief under Federal Rule of Appellate Procedure 29(a)(2) because, like Pennsylvania, they have a substantial interest in protecting the health and welfare of their residents throughout the ongoing public health emergency. Like the elected leaders of Pennsylvania, amici have made difficult but necessary choices to limit a communicable disease that spreads easily, even when a carrier is asymptomatic; that lacks a vaccine, cure, or proven treatment; and that can lead to hospitalization and death. Amici thus have an interest in ensuring that this Court properly apply the doctrines appropriate to this ongoing emergency and defer to the Commonwealth's leaders and health experts as to the best ways to save lives. Although the policies adopted by each State in the Third Circuit differ according to their needs, the decision below undermines their common efforts.

Although the crisis presented by COVID-19 is new, the appropriate rules that govern this case are not. For more than a century, the Supreme Court has recognized that in extraordinary circumstances like these, States receive additional deference as they make difficult decisions as to how to ensure the public's welfare and save lives. Courts throughout the Nation have properly applied this more deferential standard, initially set forth in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), when reviewing other States' emergency orders in response to COVID-19. Application of *Jacobson* played a role in ensuring that elected leaders—relying on public health experts—can

take whatever steps they need to keep the virus under control. By declaring *Jacobson* no longer good law, the District Court not only misunderstood the precedent but put a range of emergency orders at risk. Amici—like other States outside this Circuit—share an important interest in seeing this outlier decision set aside.

Amici also have an interest, in particular, in the judicial recognition that States can adopt measures of the kind being challenged here. As the factual record in this appeal shows, and as New Jersey and Delaware's experiences confirm, the tools that the States need to limit spread of COVID-19 include restrictions on businesses where residents congregate, and limits on gatherings. Although the particulars may differ, the States in the Third Circuit are united in their reliance on these tools to reduce person-to-person interaction, among the few weapons they have to fight the spread of COVID-19 prior to the widespread administration of a vaccine. Because the court below enjoined such measures, New Jersey and Delaware both share Pennsylvania's interest in urging this Court to undo the harm that could result.

ARGUMENT

I. COURTS MUST AFFORD THE STATES DEFERENCE IN THEIR RESPONSES TO PUBLIC HEALTH EMERGENCIES.

In declaring Pennsylvania's COVID-19 emergency orders unconstitutional, the District Court wrongly rejected a substantial body of law instructing that a court must afford deference "to the politically accountable officials of the States" when they respond to emergencies. *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring). This deference must be "'especially broad'" when, as here, those officials "'act in areas fraught with medical and scientific uncertainties.'" *Id.* (quoting *Marshall v. United States*, 414 U.S. 417 (1974)). Amici urge this Court to overturn the district court's erroneous ruling, and confirm—following the lead of the Chief Justice and the overwhelming majority of courts throughout the Nation—that States are entitled to broad deference and leeway as part of their response to a public health emergency.

For over a century, the Supreme Court "has distinctly recognized the authority of a State to enact … quarantine laws and 'health laws of every description,'" derived from the States' "police power" to "protect the public health and the public safety." *Jacobson*, 197 U.S. at 24-25; *see also, e.g.*, *Compagnie Francaise de Navigation a Vapeur v. La. State Bd. of Health*, 186 U.S. 380, 387 (1902) (noting "the power of the States to enact and enforce quarantine laws for the safety and the protection of

the health of their inhabitants ... is beyond question."). During a public health crisis, the Court held, traditional tiers of constitutional scrutiny do not apply, and courts will "only" strike down a law when it "[1] has no real or substantial relation to those objects, or [2] is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law." 197 U.S. at 31. After all, "a community has the right to protect itself against an epidemic or disease," *id.* at 27, and "[t]he mode or manner in which those results are to be accomplished is within the discretion of the state," *id.* at 25.[1]

There were good reasons for the Supreme Court to adopt this rule. For one, as the Chief Justice pointed out, the "Constitution principally entrusts '[t]he safety and the health of the people' to the politically accountable officials of the States 'to guard and protect.'" *S. Bay*, 140 S. Ct. at 1613 (Roberts, C.J., concurring). While that is, of course, always true, this power is never more important than during an emergency. *See Jacobson*, 197 U.S. at 25, 27 (noting that "a community has the right to protect itself against an epidemic of disease," and "[t]he mode or manner in which those

[1] Notably, even before the advent of COVID-19, courts repeatedly affirmed the principle that states receive deference when responding to an emergency *See, e.g.*, *United States v. Caltex*, 344 U.S. 149, 154 (1952) (holding the sovereign may take steps "in times of imminent peril" that are not otherwise permissible); *United States v. Chalk*, 441 F.2d 1277, 1280 (4th Cir. 1971) (confirming "invocation of emergency powers necessarily restricts activities that would normally be constitutionally protected"); *Hickox v. Christie*, 205 F. Supp. 3d 579, 584, 591-92 (D.N.J. 2016) (in reviewing a quarantine to limit the spread of Ebola, recognizing that States have "broad discretion" to protect public health).

results are to be accomplished is within [its] discretion"); *Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944) (explaining that one's rights do "not include liberty to expose the community ... to communicable disease"). For another, emergencies will often present ambiguity regarding the best path forward, and developing solutions requires factual analysis and expertise that States are better suited to. *See S. Bay*, 140 S. Ct. at 1613 (Roberts, C.J., concurring) (noting that "[t]he precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement," and federal judges "lack[] the background, competence, and expertise to assess public health"). Further, a key check on any emergency response is *democratic accountability*—an important tool to ensure officials will balance competing interests in ways that serve the public, but which does not tie judges' hands. *See id.* (noting judges must defer to state officials because courts are "not accountable to the people"); *cf. also Friedman v. City of Highland Park*, 784 F.3d 406, 412 (7th Cir. 2015) (noting the "central role of representative democracy is no less part of the Constitution than" other rights). Each reason calls for deference in an emergency; together, they are overwhelming.

To be clear, no State is arguing that constitutional rights disappear entirely in a crisis. The District Court rightly held that "the Constitution applies even in times of emergency," App. 21, and no one—let alone the States in this Circuit—disagrees. Rather, *Jacobson* simply makes clear that States have additional *leeway* in the face

of such emergencies. After all, federal courts frequently consider the strength of a State's interest in evaluating the validity of its laws, and in a public health emergency a State's interests are at their zenith. Similarly, federal courts regularly defer to the factual conclusions of experts and officials regarding the likely impacts of state law, which is especially critical during a still-evolving health crisis. The many doctrines that already call for deference to a state are simply magnified during an emergency, and courts must exercise caution before setting emergency orders aside.

There can be no doubt that COVID-19 qualifies as a sufficient public health crisis to justify granting the States deference in reviewing their emergency orders. As the court below acknowledged, "[t]he COVID-19 pandemic has impacted every aspect of American life." App. 1. Indeed, "[s]ince the novel coronavirus emerged in late 2019, governments throughout the world have grappled with how they can intervene in a manner that is effective to protect their citizens from getting sick and, specifically, how they can protect their healthcare systems from being overwhelmed by an onslaught of cases." *Id.* Courts and judges have recognized as much time and again. *See, e.g., In re Abbott* (*Abbott I*), 954 F.3d 772, 785 (5th Cir. 2020) (noting, even at its early stages, COVID-19 presents "a public health crisis of unprecedented magnitude"); *S. Bay*, 140 S. Ct. at 1613 (Roberts, C.J., concurring) (noting that, at that time, COVID-19 had resulted in "more than 100,000 [deaths] nationwide," and constituted "extraordinary health emergency"). Since then, and especially recently,

the threat presented by COVID-19 has grown even starker. As of November 24, 2020, the CDC has reported more than 257,000 deaths nationwide, and almost 2,000 Americans are dying *every day*. *See, e.g.,* Centers for Disease Control & Prevention ("CDC"), *Coronavirus Disease 2019 (COVID-19)—COVID-19 Cases & Deaths by State*, available at https://tinyurl.com/y4a5pbhx (last visited Nov. 24, 2020). There now have been more than 12 million cases nationwide. *Id.*

Courts of appeals have appropriately and repeatedly adopted and applied this deferential standard in evaluating COVID-19 orders. *See, e.g.*, *In re Abbott* (*Abbott II*), 956 F.3d 696, 703, 713 (5th Cir. 2020) (finding district court's failure to properly apply *Jacobson* "led to patently erroneous results and usurped the state's authority to craft emergency public health measures"); *League of Indep. Fitness Facilities & Trainers, Inc. v. Whitmer*, 814 Fed. Appx. 125, 127 (6th Cir. 2020) (citing *Jacobson* to hold "the police power retained by the states empowers state officials to address COVID-19 largely without interference from the courts"); *Ill. Republican Party v. Pritzker*, 973 F.3d 760, 763 (7th Cir. 2020) ("The district court appropriately looked to *Jacobson* for guidance, and so do we."); *In re Rutledge*, 956 F.3d 1018, 1028 (8th Cir. 2020) (finding that a "district court's failure to apply the *Jacobson* framework produced a patently erroneous result"); *Swain v. Junior*, 961 F.3d 1276, 1293-94 (11th Cir. 2020) (citing *South Bay* and *Jacobson* with approval).

Indeed, the contexts in which both the circuits and districts courts have applied *Jacobson* in reviewing COVID-19 emergency orders are legion. The rulings include those upholding emergency actions that:

- restrict the operation of certain businesses;[2]
- establish gatherings limitations;[3]

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[2] *See, e.g.*, *League of Indep. Fitness*, 814 F. Appx. at 127-28; *Columbus Ale House v. Cuomo*, No. 20-4291, 2020 WL 6507326, *2-3 (E.D.N.Y. Nov. 5, 2020); *Bimber's Delwood v. James*, No. 20-1043, 2020 WL 6158612, *6-8 (W.D.N.Y. Oct. 21, 2020); *Bill & Ted's Riviera v. Cuomo*, No. 20-1001, 2020 WL 6043991, *4 (N.D.N.Y. Oct. 13, 2020); *Open Our Oregon v. Brown*, No. 20-773, 2020 WL 5371915, *2-3 (D. Or. Sept. 8, 2020); *910 E Main LLC v. Edwards*, No. 20-965, 2020 WL 4929256, *6 (W.D. La. Aug. 21, 2020); *4 Aces Enters., LLC v. Edwards*, No. 20-2150, 2020 WL 4747660, 1, 8-9 (E.D. La. Aug. 17, 2020); *Vill. of Orland Park v. Pritzker*, No. 20-3528, 2020 WL 4430577, *7 (N.D. Ill. Aug. 1, 2020); *TJM 64, Inc. v. Harris*, No. 20-2498, 2020 WL 4352756, *3-5 (W.D. Tenn. July 29, 2020); *Tigges v. Northam*, No. 20-10, 2020 WL 4197610, 7 (E.D. Va. July 21, 2020); *CH Royal Oak, LLC v. Whitmer*, No. 20-570, 2020 WL 4033315, *6 (W.D. Mich. July 16, 2020); *Xponential Fitness v. Arizona*, No. 20-1310, 2020 WL 3971908, 7 (D. Ariz. July 14, 2020); *Local Spot, Inc. v. Lee*, No. 20-421, 2020 WL 3972747, *2 (M.D. Tenn. July 14, 2020); *Slidewaters LLC v. Wash. Dep't of Labor & Indus.*, No. 20-10, 2020 WL 3979661, *4-5 (E.D. Wash. July 14, 2020); *Miura Corp. v. Davis*, No. 20-5497, 2020 WL 5224348, *2-3 (C.D. Cal. June 25, 2020); *Talleywhacker, Inc. v. Cooper*, 465 F. Supp. 3d 523, 537-38 (E.D.N.C. 2020); *Antietam Battlefield KOA v. Hogan*, 461 F. Supp. 3d 214, 228-30 (D. Md. 2020); *Hartman v. Acton*, No. 20-1952, 2020 WL 1932896, *6 (S.D. Ohio Apr. 21, 2020); *Lawrence v. Colorado*, 455 F. Supp. 3d 1063, 1078 (D. Colo. 2020).

[3] *See, e.g.*, *Ill. Republican Party*, 973 F.3d at 763; *Elim Romanian Pentecostal Church v. Pritzker*, 962 F.3d 341, 346-47 (7th Cir. 2020); *Roman Catholic Diocese of Brooklyn v. Cuomo*, No. 20-4844, 2020 WL 6120167, *8 (E.D.N.Y. Oct. 16, 2020); *Luke's Catering Serv. v. Cuomo*, No. 20-1086, 2020 WL 5425008, *5-13

- require individuals to wear face coverings;[4] and
- impose other emergency measures.[5]

Indeed, the court below was a clear outlier, and the remaining courts in this circuit apply *Jacobson* to treat state emergency orders with respect. *See Robinson v. Murphy*, No. 20-5420, 2020 WL 5884801, *6-7 (D.N.J. Oct. 2, 2020) (noting orders "clearly surpass [*Jacobson*'s] standard as they attempt to allow New Jersey citizens

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(W.D.N.Y. Sept. 10, 2020); *Murphy v. Lamont*, No. 20-0694, 2020 WL 4435167, *9 (D. Conn. Aug. 3, 2020); *Geller v. Cuomo*, No. 20-4653, 2020 WL 4463207, *10-11 (S.D.N.Y. Aug. 3, 2020); *Legacy Church v. Kunkel*, 455 F. Supp. 3d 1100, 1139 (D.N.M. 2020); *Calvary Chapel Lone Mountain v. Sisolak*, No. 20-907, 2020 WL 3108716, *2-4 (D. Nev. June 11, 2020); *Amato v. Elicker*, No. 20-464, 2020 WL 2542788, *9-11 (D. Conn. May 19, 2020); *Geller v. De Blasio*, No. 20-3566, 2020 WL 2520711, *3-5 (S.D.N.Y. May 18, 2020); *Calvary Chapel of Bangor v. Mills*, 459 F. Supp. 3d 273 (D. Me. 2020); *Lighthouse Fellowship Church v. Northam*, 458 F. Supp. 3d 418 (E.D. Va. 2020); *Gish v. Newsom*, No. 20-755, 2020 WL 1979970, *4-5 (C.D. Cal. Apr. 23, 2020).

[4] *See, e.g.*, *Cangelosi v. Bel Edwards*, No. 20-1991, 2020 WL 6449111, *5 (E.D. La. Nov. 3, 2020); *Vincent v. Bysiewicz*, No. 20-1196, 2020 WL 6119459, *11-12 (D. Conn. Oct. 16, 2020); *Minn. Voters All. v. Walz*, No. 20-1688, 2020 WL 5869425, *11-12 (D. Minn. Oct. 2, 2020).

[5] *See, e.g.*, *Snider v. Cain*, No. 20-670, 2020 WL 6262192, *3 (N.D. Tex. Oct. 23, 2020) (requiring all travel for essential services be carried out by a single member of household); *Brach v. Newsom*, No. 20-6472, 2020 WL 6036764, *2-3 (C.D. Cal. Aug. 21, 2020) (prohibiting in-person education); *Alsop v. Desantis*, No. 20-1052, 2020 WL 4927592, *2-5 (M.D. Fla. Aug. 21, 2020) (suspending vacation home rentals); *Bannister v. Ige*, No. 20-305, 2020 WL 4209225, *4 (D. Haw. July 22, 2020) (mandate self-quarantine); *Ass'n of Jewish Camp Operators v. Cuomo*, No. 20-687, 2020 WL 3766496, *7-9 (N.D.N.Y. July 6, 2020) (prohibiting overnight summer camp operations).

freedom to participate in important activities … while implementing measures to contain outbreaks of COVID-19"), *inj. denied*, No. 20-3048, Dkt. 27 (3d Cir. Nov. 10, 2020); *Dwelling Place Network v. Murphy*, No. 20-6281, Dkt. 36 at T71:14-23 (D.N.J. June 15, 2020) (agreeing that "[w]e, the judges, have no special expertise in these kinds of situations, and we're not answerable to the people because we're Article III judges, so we must defer to what the State is trying to do"); *Bullock v. Carney*, No. 20-674, 2020 WL 2813316, *5 (D. Del. May 29, 2020), *aff'd* 806 Fed. Appx. 157 (3d Cir. May 30, 2020); *Paradise Concepts v. Wolf*, No. 20-2161, 2020 WL 5121345, *5 (E.D. Pa. Aug. 31, 2020); *Nat'l Ass'n of Theatre Owners (NATO) v. Murphy*, No. 20-8298, 2020 WL 5627145, *15-16 (D.N.J. Aug. 18, 2020); *Benner v. Wolf*, No. 20-775, 2020 WL 2564920, *6 (M.D. Pa. May 21, 2020).

In refusing to apply a deferential approach, the District Court misunderstood these black letter principles in fundamental ways. The most obvious problem is that the court below erroneously viewed this case as presenting a binary choice between the State's interest in saving lines and an individual's constitutional liberties. But the point of *Jacobson* and its progeny is that "[r]eal liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others." *Jacobson*, 197 U.S. at 26. Put another way, the residents of Pennsylvania—and of each State in this Circuit—have a liberty interest in being

free from exposure to a communicable disease, and their neighbor's liberties do not include exposing them to it. *See Prince*, 321 U.S. at 166-67 (noting one's rights "do[] not include liberty to expose the community … to communicable disease"). After all, the risk of disease extends not only to those who participate in certain activities, but also those who unwittingly come into contact with them, and those *they* contact, and the next, and the next. The District Court's choice was therefore a false one.

Second, the refusal to defer to the Commonwealth's emergency response gave short shrift to important principles of democratic accountability and federalism. The District Court believed that it needed to step in to put a stop to the "one-person rule" and "government by fiat" of the Governor's emergency orders. App. 20. For one, whether the Governor is exercising lawful authority as a matter of state law is not a question for federal courts to decide. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99-100 (1984); *see also Friends of Danny DeVito v. Wolf*, 227 A.3d 872, 897 (Pa. 2020) (finding Pennsylvania Governor had authority under state law to act as he did). But more fundamentally, one-person rule is *precisely* the scenario *Jacobson* is intended to avoid: to prevent an unelected, appointed-for-life judge from stepping in and substituting his judgment for that of a State's experts—including the judgment of a Governor who remains directly accountable to the voters. *See S. Bay*, 140 S. Ct. at 1613 (Roberts, C.J., concurring) (reminding courts that they lack "the background, competence, and expertise to assess public health" and they are "not

accountable to the people"). The court swapped one perceived fiat for another, and in so doing it diminished the expertise and accountability involved.

Finally, the District Court's conclusion that *Jacobson* no longer holds, at least in part because the emergency to which they are responding has lasted eight months, is illogical. There is still no "cure, widely available effective treatment, or approved vaccine." *Id*. The virus still spreads by person-to-person contact, including by those who show no symptoms, and remains fatal. And if anything, conditions are *worse*: as of mid-November, "nearly 62,000 COVID-19 patients were hospitalized around the country, surpassing the highs of the midsummer and spring surges." *See* Will Stone, *COVID-19 Hospitalizations Hit Record Highs*, NPR (Nov. 10, 2020), available at https://tinyurl.com/y4aztcey; *see also id.* (doctors explaining that since hospitalizations are spiking everywhere, "there won't be flexibility to shuffle around resources to the places in need because everywhere will be overwhelmed"). At the same time, the Nation's health experts are still learning about the disease, how it operates, and how best to fight it. *See* CDC, *Coronavirus Disease 2019 Frequently Asked Questions*, available at https://tinyurl.com/vwxtxpp (last visited Nov. 24 2020) (noting there is "growing evidence that droplets and airborne particles can remain suspended in the air and be breathed in by others, and travel distances beyond 6 feet"). Is it thus no surprise that almost every other court found that *Jacobson*'s teachings still hold—and that our Nation remains mired in a crisis.

The court's abrupt declaration that *Jacobson* is no longer law upends critical principles that federal courts have relied on for 115 years and will cripple the States' power to protect their residents from the ongoing crisis. It must be reversed.

II. THE DECISION BELOW UNDERCUTS KEY TOOLS STATES NEED TO COMBAT THE SPREAD OF COVID-19.

In the face of this unprecedented public health emergency, States in the Third Circuit need every tool at their disposal to effectively limit person-to-person contact to limit the spread of COVID-19. Until there is a widely-available vaccine, there are few other options on which policymakers can rely in order to keep their populations safe from this at-times fatal disease. These options include limits on gatherings and restrictions on businesses open to the public. Since Pennsylvania convincingly lays out why use of these tools is plainly constitutional, amici—the remaining States in this Circuit—write to emphasize the evidence that the sorts of measures at issue here can save lives, and already have.

A. Limits on Gatherings

As Pennsylvania explains, the District Court's decision to invalidate its limits on gatherings is plainly wrong as a matter of constitutional law. *See* Appellant Br. 57-70 (discussing, *e.g.*, *Arcara v. Cloud Books*, 478 U.S. 697, 706 (1986)).[6] That is

[6] Although there have been some disputes among jurists regarding the application of gatherings limits to religious gatherings under the Free Exercise Clause—an issue that does not arise in this case—amici are not aware of *any other case* to invalidate

especially troubling because this error risks catastrophic impacts on public health in Pennsylvania and in the States in the Third Circuit.

Public health studies and experts specifically and repeatedly describe the risks that gatherings present during this pandemic. *See* Johns Hopkins Center for Health Security, *Public Health Principles for a Phased Reopening During COVID-19* (Apr. 17, 2020), available at https://tinyurl.com/y85tvj4x (noting "[s]uperspreading events have been linked to religious services, choir practice, and large family gatherings, among others."); *id.* (finding gatherings present "high" risk of transmission); Isaac Ghinai, et al., *Community Transmission of SARS-CoV-2 at Two Family Gatherings, Chicago, Ill., Feb.-March 2020*, MORB. MORTAL WKLY. REP., (Apr. 17, 2020), available at https://tinyurl.com/y5r2behc (discussing "cluster of 16 confirmed or probable cases, including three deaths, [that] likely result[ed] from one introduction. Extended family gatherings including a funeral and a birthday party likely facilitated transmission of SARS-CoV-2 in this cluster."); Lea Hamner, et al., *High SARS-CoV-2 Attack Rate Following Exposure at a Choir Practice—Skagit Cty., Wash.*, MORB. MORTAL WKLY. REP. (May 15, 2020), available at https://tinyurl.com/y2om8nyw

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general gatherings limits on federal constitutional grounds. Instead, as Pennsylvania notes, even the minority of justices who have called into question limits on religious gatherings have recognized that claims like the ones Appellees pursue here still fail. *See, e.g., Calvary Chapel Valley v. Sisolak*, 140 S. Ct. 2603, 2608 (2020) (Alito, J., dissenting) (noting "*Jacobson* must be read in context, and it is important to keep in mind that *Jacobson* primarily involved a substantive due process challenge").

("Following a 2.5-hour choir practice attended by 61 persons, including a symptomatic index patient, 32 confirmed and 20 probable secondary COVID-19 cases occurred (attack rate = 53.3% to 86.7%); three patients were hospitalized, and two died."). The science is clear on this threat.

Indeed, throughout this crisis, gatherings have been linked to scores of new COVID-19 cases and deaths. *See*, *e.g.*, Kate Conger, et al., *Churches Were Eager to Reopen. Now They Are Confronting Coronavirus Cases*, N.Y. TIMES (July 8, 2020), available at https://tinyurl.com/y85p6jyx; Chacour Koop, *"It Spread Like Wildfire." How One Man at Church with COVID-19 Led to 91 Cases in Ohio*," KAN. CITY STAR (Aug. 5, 2020), available at https://tinyurl.com/y66awgph; John Enger, *COVID-19 Cases Tied to MN Campaign Events—But Full Impact is Unclear*, MPR NEWS (Oct. 17, 2020), available at https://tinyurl.com/y5lx9swp; Meryl Kornfield, *Maine Wedding "Superspreader" Event is Now Linked to Seven Deaths. None of those People Attended*," WASH. POST (Sept. 16, 2020), available at https://tinyurl.com/y4qkj6uv; Allison James et al., *High COVID-19 Attack Rate Among Attendees at Events at a Church — Ark., Mar. 2020*, 69 MORBIDITY & MORTALITY WEEKLY REP. 632 (2020), available at https://tinyurl.com/yyyy3ybu.[7] Gatherings pose significant health risks to the residents in this circuit.

[7] Such events come in all shapes and stripes, from religious services to large political rallies to small family celebrations. *See* Collins Parker, *Health Department Warns*

Expert recommendations, in particular from the CDC, are consistent with that evidence. As the CDC lays out, the *highest* risk activities for contracting COVID-19 are "[l]arge in-person gatherings where it is difficult for individuals to remain spaced at least 6 feet apart and attendees travel from outside the local area." *Considerations for Events and Gatherings*, available at https://tinyurl.com/yamvsp2a (last visited Nov. 24, 2020). CDC recommendations including cancelation of large gatherings even when a "minimal-to-moderate level of community transmission" is present, and the CDC recognizes it may be necessary to have numerical caps set by "community leadership based on the current circumstances." CDC, *Interim Guidance: Get Your Mass Gatherings or Large Community Events Ready for Coronavirus Disease 2019 (COVID-19)*, available at https://tinyurl.com/y28p53ev (last visited Nov. 24, 2020); *CH Royal Oak*, 2020 WL 4033315, *6 (noting CDC findings that "as gatherings grow larger, so too does the risk each attendee faces of becoming infected with COVID-19").

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of COVID-19 Infection at Republican Lincoln Dinner, WDEF CHATTANOOGA (Aug. 5, 2020), https://tinyurl.com/yxuz83uv (political fundraiser linked to deaths and hospitalization in Tennessee); Karen Weintraub, *Researchers Track Coronavirus Infections from "Superspreader" Events*, USA TODAY (Aug. 26, 2020), https://tinyurl.com/yypvn94r (single conference in Boston in late February, attended by about 200, was linked to at least 90 COVID-19 cases in Massachusetts—and up to 20,000 cases worldwide); Youjin Shin, et al., *How a South Korean Church Helped Fuel the Spread of Coronavirus*, WASH. POST (Mar. 25, 2020), https://tinyurl.com/y6sqxs2u (single individual attending service at the Shincheonji Church of Jesus in South Korea linked to at least 5,000 COVID-19 cases).

Nor is the CDC alone: a number of other experts have recommended that persons "avoid[] group gatherings" as a means to limit the spread of COVID-19. *See* Hamner, *supra*, at 609; *see, e.g.*, App. 311-318 (Decl. of Executive Deputy Secretary at Pennsylvania Department of Health Sarah Boateng) (discussing need to limit such gatherings); Tex. Med. Ass'n, *TMA Chart Shows COVID-19 Risks for Various Activities* (last visited Nov. 24, 2020), available at https://tinyurl.com/yyv95xxa (state medical association listing gatherings as among the highest risk activities); Ill. State Med. Society, *ISMS COVID-19 Risk Survey* (last visited Nov. 24, 2020), available at https://tinyurl.com/yynmujyo (same); *Doctors Call for More Restrictions & Caution as Virus Surges*, N.Y. TIMES (Nov. 18, 2020), available at https://tinyurl.com/y466j6on; Ashton Pittman, *After Big Thanksgiving Dinners, Plan Small Christmas Funerals, Health Experts Warn*, MISS. FREE PRESS (Nov. 16, 2020), https://tinyurl.com/yy665fqt. Simply put, the evidence is clear.

The decision below puts public health at risk. Consistent with the science, this Court should allow States to rely on gatherings limits as an emergency tool.

B. Business Restrictions And Stay-At-Home Orders

The evidence confirms that another tool will help limit the spread of COVID-19: placing restrictions on, and at times even closing to the public, business premises where individuals are likely to congregate.

In the early weeks of the pandemic, at least 34 states mandated the closure of all non-essential businesses. Deidre McPhillips, *The Statistical Support for Closing Non-Essential Businesses*, U.S. NEWS (May 18, 2020), https://tinyurl.com/yd4c2jkq. Since then, in light of a resurgence in cases across the Nation, many States either paused their reopening plans or issued new restrictions. In Washington, for example, bar and restaurants were ordered to shut down indoor service, while indoor gyms, fitness centers, movie theaters, bowling alleys, and museums must also close. David Gutman, et al., *Gov. Inslee Orders Sweeping Restrictions on Indoor Gatherings, Restaurants, Bars, Gyms as COVID-19 Cases Surge in Washington State*, SEATTLE TIMES (Nov. 16, 2020), https://tinyurl.com/y3csscy4. Other states, including New Jersey, have also imposed renewed restrictions in light of a second COVID-19 wave. David K. Li, *Bars, Restaurants and Gyms in New York Face New Restrictions Due to Covid-19 Increase*, NBC NEWS (Nov. 11, 2020), https://tinyurl.com/y2em7vhr; N.J. Exec. Order 194 (Nov. 10, 2020); N.J. Exec. Order 195 (Nov. 12, 2020); N.C. Exec. Order 176 (Nov. 10, 2020); S.C. Exec. Order 2020-63 (Oct. 2, 2020).

States were hardly alone in closing businesses and other venues, especially in the face of a second wave of COVID-19 cases, hospitalizations, and deaths. Nations around the world did so at the beginning of the pandemic. *See, e.g.*, *Coronavirus: The World in Lockdown in Maps & Charts*, BBC (Apr. 6, 2020), available at https://tinyurl.com/y96n79fo; Derrick Bryson Taylor, *A Timeline of the Coronavirus*

Pandemic, N.Y. TIMES (Aug. 6, 2020), available at https://tinyurl.com/wb48cut. And many countries have begun to do so again, as COVID-19 cases rise once more. *See, e.g.,* Karl Janicek, *Czechs Enter Second Lockdown to Avoid Health System Collapse*, AP NEWS (Oct. 22, 2020), available at https://tinyurl.com/y6zjrytk; Lorne Cook, *Belgium Imposes Covid Curfew, Closes Bars and Restaurants*, AP NEWS (Oct. 16, 2020), available at https://tinyurl.com/y6s7q8gt; Chico Harlan & Stefano Pitrelli, *Italy Shutters Nightclubs, Mandates Masks as Coronavirus Case-Numbers Rise Again*, WASH. POST (Aug. 17, 2020), available at https://tinyurl.com/y47w5max; Matina Steveis-Gridneff, *France and Germany Lock Down as Second Coronavirus Wave Grows*, N.Y. TIMES (Oct. 28, 2020), available at https://tinyurl.com/yyf27v6a; *Warning Over Tough Fines as New Lockdown Begins*, BBC (Nov. 5, 2020), available at https://tinyurl.com/y2v8lm3h.

There is a good reason why so many states—and so many countries across the globe—have relied on such restrictions: they save lives. A growing body of data confirms the efficacy of government orders that issued stay-at-home orders or closed businesses and other venues to curb the virus's spread. As one expert put it bluntly, "while the set of businesses deemed essential in each place differed … simply making the widespread declaration to close non-essential businesses may have been the key to managing the spread of the virus in certain states, regardless of the specific businesses that made the list." *See* McPhillips, *supra*. Those states that closed non-

essential businesses saw a significant drop each week in the daily rate of new cases. *Id.* They went from a 40% daily average growth rate the week leading up to non-essential closures to a 20% growth rate the week after the closures, a halving of the growth rate. *Id.* The effectiveness of these closures was even more apparent in the second and third weeks after their implementation with new case rates being slashed to 12% and 6%, respectively. *Id.* Indeed, this same analysis showed that the quicker non-essential business closures were mandated, the quicker and steeper the drop in the daily average growth rate. *Id.* That is why orders in Pennsylvania and the amici States made a difference—they implemented closures more quickly than a number of their sister States. *See id.* Indeed, in Delaware the daily growth rate of COVID-19 cases dropped from 43% to 18% within a week. *Id.*[8]

Another study, cited by the CDC, reviewed New York City's March 22, 2020 closure of non-essential businesses to examine how they and other restrictions on activities affected COVID-19 spread. *See* George J. Borjas, *Business Closures, Stay-at-Home Restrictions, & COVID-19 Testing Outcomes in N.Y.C.*, PREVENTING

[8] The converse is true as well: States that lifted restrictions too quickly saw upticks in COVID-19 cases. Arizona, for example, lifted many of its restrictions on June 1, 2020, and saw an explosion in the rate of COVID cases. Brian P. Dunleavy, *CDC: Arizona Mask Mandates, Business Closures Slowed Spread of COVID-19*, UPI (Oct. 6, 2020), available at https://tinyurl.com/yykzp5jw. When Arizona officials began to once again impose restrictions, including the closure of non-essential businesses, daily rates of new COVID-19 cases plunged. *Id.*

CHRONIC DISEASE (Sept. 17, 2020), available at https://tinyurl.com/y4vvk7wr. The report concluded that having a "large number of visits to local businesses [based on smartphone location] increased the positivity rate of COVID-19 tests, while a large number of smartphones that stayed at home decreased it. A doubling in the relative number of visits increases the positivity rate by about 12.4 percentage points.... A doubling in the relative number of stay-at-home devices lowered it by 2.0 percentage points." *Id.* As a result, the study continued, "the business closures and out-of-home activity restrictions decreased the positivity rate, accounting for approximately 25% of the decline observed in April and May 2020." *Id.*

A similar peer-reviewed study, published on November 10, 2020, used cell phone data to map the hourly movements of 98 million people from neighborhoods to points of interest in 10 metropolitan areas around the country. *See* S. Chang, et al., *Mobility Network Models of COVID-19 Explain Inequities & Inform Reopening*, NATURE (Nov. 10, 2020), available at https://tinyurl.com/yy6ry25e. Among other things, the study found the timing and magnitude of "mobility reduction" through stay-at-home orders and closures, as well as a reopening with "reduced maximum occupancy," substantially reduce the predicted COVID-19 spread. *Id.* There thus can be little doubt that restrictions on non-essential businesses, along with a general stay-at-home mandate, can make a difference in slowing the spread of COVID-19.

It is also true that not every business presents equal levels of risk. Instead, the risks presented by a venue turn on the volume of the person-to-person contacts that take place there; the intensity of those contacts, including how close the interactions are and how long they last; and the quality of the interactions. That is why it makes sense that States like Pennsylvania and amici have, at times, required the closures of or stricter capacity limits on most businesses while leaving an exception for certain retail businesses. Indeed, the Chief Justice powerfully explained, at retail venues like "grocery stores, banks, and laundromats ... people neither congregate in large groups nor remain in close proximity for extended periods," which stands in contrast to the ways persons interact at "lectures, concerts, movie showings, spectator sports, and theatrical performances." *S. Bay*, 140 S. Ct. at 1613 (Roberts, C.J., concurring). It makes sense to treat retail with a lighter touch than other indoor venues.

Expert research bears out the conclusion that a State can sensibly allow retail to be open (or open at a greater capacity limit) even when other business enterprises are closed to the public or held to stricter limits. *See, e.g.,* Chang, *supra* (finding that "full-service restaurants, gyms, hotels, cafes, religious organizations, and limited-service restaurants produced the largest predicted increases in infections when reopened," unlike retail stores); Tex. Med. Ass'n, *Chart Shows COVID-19 Risks for Various Activities*, *supra* (listing risks associated with different businesses); Ill. State Med. Society, *ISMS COVID-19 Risk Survey, supra* (same); Even without addressing

"essential" classifications, it makes eminent sense that other businesses were closed even as retail was open.

Of course, amici States—like Pennsylvania—did need to distinguish between essential retail and non-essential retail at the peak of the pandemic's first wave, but there is nothing nefarious or unconstitutional about that. To the contrary, during an emergency, a State's officials are required to protect the most fundamental needs of the populace because the failure to do so would, itself, greatly undermine the public health and safety. *See Altman v. Cty. of Santa Clara*, 464 F. Supp. 3d 1106, 1128-32 (N.D. Cal. 2020) (finding the state offered a "convincing reason" for exempting from closure certain essential businesses that provide for the basic needs of residents for food, medicine, hygiene, and shelter). There should be nothing controversial about the idea that the Commonwealth protected individuals' ability to access fresh food during a pandemic, of critical importance to their health, while not ensuring residents the same access to a store that sells watersports equipment. In other words, for each activity, officials must weigh both the risks *and the need* for such activity—to ensure that, whenever individuals do risk spreading COVID-19, there really is a sufficiently immediate and compelling need to do so. So while amici States, Pennsylvania, and dozens of other states across the country may have drawn their "essential" and "non-essential" line in slightly different ways, they all recognized the need to draw these

kinds of distinctions to appropriately balance the public's interests. That is precisely what the democratic branches, and not courts, are called on to do.

Black letter legal principles make clear that the claims challenging restrictions on businesses of the kind Appellees pursue here must be rejected out of hand. *See, e.g., Calvary Chapel*, 140 S. Ct. at 2614 (Kavanaugh, J., dissenting) (explaining that the federal "courts should be extremely deferential to the States when considering a substantive due process claim by a secular business that is being treated worse than another business"). As to substantive due process, Appellees can only prevail if they show a fundamental right deeply rooted in this Nation's history and tradition and in the concept of ordered liberty *and* that the State's conduct contravening those rights was conscience-shocking. *See Nicholas v. Pa. State Univ.*, 227 F.3d 133, 139 (3d Cir. 2000). As to the former, this Court has *rejected* precisely the *Lochner*-based theory on which the court below relied, making clear that the "right to 'engage in business'" is "not protected by substantive due process." *Wrench Transp. Sys. v. Bradley*, 340 F. App'x 812, 815 (3d. Cir. 2009); *Joey's Auto Repair & Body Shop v. Fayette Cty.*, 785 F. App'x 46, 50 (3d Cir. 2019) (same). And in any event, restricting business activity as one of the only tools the States have to limit the spread of this communicable disease—the same tool adopted by so many states and countries this year—in no way shocks the conscience.

That is why court after court has rejected similar substantive due process and equal protection claims brought in federal court by businesses. *See, e.g.*, *League of Indep. Fitness*, 814 Fed. App'x. at 129 (rejecting similar business claims on rational basis review and finding that while "the Order does not close every venue in which the virus might easily spread … the Governor's order need not be the most effective or least restrictive measure possible to attempt to stem the spread of COVID-19"); *NATO*, 2020 WL 5627145, *8-15; *CH Royal Oak*, 2020 WL 4033315, *5-6; *Dark Storm Indus.*, 2020 WL 3833107, *8-15; *Atilis Gym Bellmawr, LLC v. Murphy*, 20-6347, Dkt. 30 at T33:14-35:7 (D.N.J. June 19, 2020). This Court, too, should have no trouble rejecting the unprecedented substantive due process and equal protection claims on which the District Court—and the District Court alone—relied below.

CONCLUSION

This Court should reverse the judgment below.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(a)(4)(G) and Fed. R. App. P. 32(g)(1), the undersigned hereby certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B)(i) and Fed. R. App. P. 29(a)(5):

1. This brief is 6,309 words, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable.
2. This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman type, which complies with Fed. R. App. P. 32 (a)(5) and (6).

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CERTIFICATE OF SERVICE

I hereby certify that on November 24, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Third Circuit using the appellate CM/ECF system. Counsel of record for all parties are registered CM/ECF users and will be served by the appellate CM/ECF system.

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